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No. 07-688

FILED
FEB - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

The State fails to address the question presented or the reasons for review. The question is whether an erroneous instruction that invites the jury to base its conviction on propensity evidence violates due process, undermines the burden of proof and "vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993). This issue has evaded and will continue to evade federal habeas review. While the federal Courts of Appeal are in agreement that such circumstances impinge on due process, this Court has left the question open, *Estelle v. McGuire*, 502 U.S. 62, 74 n.5 (1991), and the state courts are therefore free to ignore this constitutional requirement. *See* 28 U.S.C. § 2254(d)(1)(restricting body of law on federal habeas review to the decisions of this Court). This Court should grant review and resolve this issue dividing state and federal courts once and for all.

ARGUMENT

I. THE STATE DOES NOT ADDRESS THE REASONS THAT CERTIORARI SHOULD BE GRANTED.

Review is warranted here for two compelling reasons: First, state courts consistently fail to recognize that propensity errors raise due process concerns and require the structural error analysis set out in *Sullivan v. Louisiana*, 508 U.S. at 281-282, and *Neder v. United States*, 527 U.S. 1, 11-13 (1999). Second, unless this Court grants certiorari, these constitutional errors will remain insulated from federal habeas review. The State offers no response to either point.

A. Certiorari should be granted to resolve that an instruction inviting juries to convict based on a defendant's "propensity" to commit crimes is fundamental error.

The State argues the wrong question, urging that the *admissibility* of prior bad acts evidence is governed by state law and reviewed for harmless error. That is not the question presented. Mr. Bolin's petition does not challenge the *admission* of prior bad act evidence; it challenges the concededly erroneous *instruction* to the jury inviting a conviction based on propensity evidence. Whether that instruction is structural error under *Sullivan* and *Neder* is an open question that demands this Court's review.

The State responds that *Sullivan* and *Neder* do not concern "errors in the *admission* of prior bad act evidence." (Opp. at 6.) That is true. *Sullivan* and *Neder* address *instructional* error and are directly applicable to the question presented here: whether the conceded instructional error is ordinary trial error or fundamental structural error. As the Petition argued, under *Sullivan* and *Neder*, the erroneous instruction to consider prior bad acts as evidence of propensity "vitiates *all* the jury's findings." 508 U.S. at 281 (emphasis in original). In this circumstantial case, there is no "untainted" evidence to weigh the taint against, thus rendering harmless error analysis completely ineffectual: a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* The effect of the error itself is "unquantifiable," and thus not subject to harmless error review. *Id.* at 282.

B. Absent review, a recognized due process violation will continue to evade federal habeas review.

Mr. Bolin's case presents an ideal vehicle for resolving an important issue that otherwise is insulated from habeas review in the federal courts. Every federal circuit court to consider the issue has held that the erroneous instruction to consider propensity evidence implicates the federal due process guarantee.[1] Without this Court's intervention, however, state court errors relating to propensity evidence—no matter how unreasonable—are wholly unreviewable by the lower federal courts. *See Alberni*, 458 F.3d at 865-867 (applying AEDPA and holding that a federal court cannot reject a state court's decision on whether propensity evidence compromises due process because the question has been expressly left open by this Court).

Under AEDPA, federal courts may grant habeas relief only for violations of "clearly established

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[1] *See Alberni v. McDaniel*, 458 F.3d 860, 865-66 (9th Cir. 2006) (collecting cases and stating that "every circuit . . . has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair."); *see also Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (failure to give a limiting instruction could "constitute an error so egregious as to amount to a denial of due process"); *Albrecht v. Horn*, 485 F.3d 103, 128-129 (3d Cir. 2007) (admission of propensity evidence without a limiting instruction could violate due process if sufficiently "inflammatory"); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993)(admission of irrelevant propensity evidence violated due process clause); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (acknowledging that mistakenly admitted evidence of prior crimes or convictions can "imping[e] upon the fundamental fairness of the trial itself.")(internal quotations omitted).

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (defining the applicable body of law as "the holdings, as opposed to the dicta, of this Court's decisions"). This Court's holdings need not be explicit to establish grounds for habeas relief; the lower federal courts may grant relief for a state court's unreasonable refusal to extend the general principles established in this Court's holdings to a new context. *Id.* at 407-408. But, because this Court in *Estelle* expressly reserved judgment on the issue, the federal courts routinely hold that AEDPA bars relief for the erroneous use of a prior conviction to establish "propensity," because the law is not "clearly established" by this Court.[2] This result transforms the pragmatic reservation of judgment in the *Estelle* footnote—written years before AEDPA was enacted—into a permanent and unintended jurisdictional bar.

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[2] *See, e.g., Paige v. Bradshaw*, No. 1:05-CV-2618, 2007 WL 4323785 (N.D. Ohio Apr. 4, 2007), at *11-12 (denying habeas relief in case involving decades old allegations of uncharged misconduct because "the Supreme Court [in *Estelle*] has left the issue open"); *Baker v. Lewis*, No. Civ. S-01-0804 LKK JFMP, 2007 WL 1040969 (E.D. Cal. Apr. 4, 2007), at *28 (denying petition for habeas relief on additional ground that "the Supreme Court has not expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes"); *Casey v. Brown*, No. C:04-4749 RJH (PR), 2007 WL 2209325 (N.D. Cal. July 30, 2007), at *10 ("Because . . . there is no clearly-established Supreme Court authority, habeas relief could not be granted even if the court were to hold that petitioner's due process rights were violated.")

The State does not address this ground for certiorari. Indeed, it has missed the issue entirely. In its Opposition, the State misreads *Alberni,* claiming that the court reached the merits of the due process issue and approved the admission of propensity evidence. (Opp. at 8.) That is not what *Alberni* held. Rather, the *Alberni* court held that it could not grant habeas relief under AEDPA because of the express reservation in the *Estelle* footnote—precisely the ground Mr. Bolin urges here to support certiorari. *See Alberni*, 458 F.3d at 866-67 (stating that it could not conclude that the Nevada Supreme Court acted unreasonably in light of *Estelle*, because "[t]he right Mr. Alberni asserts has not been clearly established by the Supreme Court, as required by AEDPA").

This Court should grant review to correct the erroneous application of harmless error review, and in the process acknowledge what the lower federal courts have already settled: the erroneous instruction to consider prior bad act evidence as propensity evidence runs afoul of due process guarantees. This issue should be resolved in this Court's jurisprudence, eliminating the injustice created by the intersection between the *Estelle* footnote and the AEDPA standard for relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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